STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v LAWRENCE PAUL MOTT, Defendant-Appellant.	UNPUBLISHED January 31, 2008 No. 275196 Wayne Circuit Court LC No. 06-007929-01

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of possession of a firearm during the commission of a felony, MCL 750.227b, and armed robbery, MCL 750.529, for which the trial court imposed consecutive terms of imprisonment of two years, and 81 months to 15 years, respectively. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

I. Facts

This case arises from an incident that took place in Detroit on June 16, 2006. The principal complainant testified that she was alone in the back seat of a parked car in a lit parking lot early in the morning, when defendant approached and, in the course of an exchange of about two minutes, asked for her phone number, then left. Her companions then returned to the car and started driving, but someone else blocked the way, upon which defendant entered the car, sat next to complainant, and robbed her at gunpoint.

Several days later, the police found defendant in a car with several pieces of complainant's property that had been taken in the robbery. While defendant was in custody, the police presented complainant with two sheets of facial photographs, from which she identified defendant. Defense counsel was present for this procedure.

On appeal, defendant argues that the trial court erred in refusing to suppress the photographic identification, on the ground that a corporeal lineup should have been arranged instead of a photographic one, and, alternatively, in admitting complainant's subsequent in-court identification of defendant at trial, on the ground that the identification was tainted by an improperly suggestive procedure.

II. Photographic Identification

In reviewing a trial court's decision following a suppression hearing, we review the trial court's factual findings for clear error, but reviews the legal conclusions de novo. See *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

A photographic lineup is generally improper where the suspect is in custody or otherwise available to appear in a corporeal lineup. *People v Kurylczyk*, 443 Mich 289, 298 n 8, 318; 505 NW2d 528 (1993). However, a photographic lineup may be used where "[t]here are insufficient number of persons available with defendant's physical characteristics" for a corporeal one. *People v Anderson*, 389 Mich 155, 187 n 22; 205 NW2d 461 (1973), overruled in part on other grounds in *People v Hickman*, 470 Mich 602, 603-604; 684 NW2d 267 (2004).

In this case, the officer in charge testified at the *Wade*[1] hearing that he resorted to a photo array because he was unable to obtain enough persons with characteristics similar to defendant to conduct a live lineup. The officer recounted looking through five police districts for persons similar in appearance to defendant. The trial court held that the officer had demonstrated "good faith" in checking those various districts. We agree.

Defendant emphasizes that the officer admitted that he did not check the Wayne County Jail. However, "There is no authority that requires the police to make endless efforts to attempt to arrange a lineup." *People v Davis*, 146 Mich App 537, 547; 381 NW2d 759 (1985). The five police districts the officer did check constituted a reasonable attempt to find a suitable number of persons for a corporeal lineup. That the officer could have expended still further efforts does not mean that those he did expend were insufficient. Because the officer apparently exhausted the normal avenues within the Detroit Police Department for locating suitable lineup subjects, the officer was not additionally required to go outside the Department and seek information, and cooperation, from the county jail system. *Id.*

II. In-Court Identification

A trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous; clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made. *Kurylczyk*, *supra* at 303; *People v Williams*, 244 Mich App 533, 537; 624 NW2d 575 (2001). The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive as to render the identification irreparably unreliable. *Kurylczyk*, *supra* at 311-312; *People v McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *Davis*, *supra* at 548. If a witness is exposed to an impermissibly suggestive pretrial lineup or showup, that witness' in-court identification of the defendant should not be allowed unless the prosecutor shows by clear and convincing evidence that the in-court identification has a sufficiently independent basis to purge the taint of the improper identification. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92

[1] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

(1998); *People v Kachar*, 400 Mich 78, 95-97; 252 NW2d 807 (1977). "The need to establish an independent basis for an in-court identification arises [only] where the pretrial identification is tainted by improper procedure or is unduly suggestive." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995) (citations omitted).

Because we conclude above that the photographic identification procedure employed in this instance was not improper, the question that remains is whether it was nevertheless unduly suggestive. Because defendant was represented by counsel at the photographic lineup, he has the burden of showing that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Complainant was shown two sets of six photographs, and identified defendant from the first before seeing the second. Defendant suggests that this indicates that complainant never seriously considered the second set, but we do not take complainant's confident identification of defendant from the first to indicate that she paid no attention whatever to the second.

Defendant emphasizes that in the photo array he is the only person depicted in a shirt matching what complainant described from the crime scene. However, such alignments of clothing "will not vitiate the lineup, even where the clothing serves to draws attention away from other lineup participants," where the clothing is not otherwise distinctive. *People v Morton*, 77 Mich App 240, 245; 258 NW2d 193 (1977) (internal quotation marks and citation omitted).

Defendant otherwise argues that only one other lineup participant joined defendant in fitting the description complainant had given to the police. We disagree. The actual exhibits offered at trial did not accompany the record available to this Court for purposes of this appeal. Plaintiff has appended reproductions of the six photographs composing only the first array the complainant was shown. Defendant is depicted with very short hair on his scalp, and short, well-trimmed, mustache and beard. We discern light facial hair on at least four of the other participants, and, in light of the short grooming of facial hair in the picture of defendant, we conclude that that representation did not for that reason draw attention from participants with no facial hair. Likewise, that one or two subjects appear bald created no stark contrast with the short hair defendant and the other subject displayed. All participants appear to share defendant's African-American ethnicity; although there is some variation in degrees of darkness of complexion, none differs from defendant dramatically in that regard. Defendant protests that complainant had described her assailant as being of medium build, while one lineup participant was of heavy frame. But that difference, in photographs showing the subjects from just below the collar upward, is not so obvious as to draw attention for that reason alone.

For these reasons, we conclude that defendant has failed to show that the photographic lineup was unduly suggestive. We, therefore, conclude that the trial court properly admitted complainant's identification of defendant at trial.

Affirmed.

/s/ Richard A. Bandstra
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto